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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

TRUSTEES OF THE OPERATING ENGINEERS
PENSION TRUST, et al,

Plaintiffs,

vs.

THORNTON CONCRETE PUMPING, INC., a
Nevada corporation; and RICHARD
THORNTON, individually,

Defendants.

Case No.: 2:10-cv-502-JCM-PAL

Consolidated with 2:10-cv-1242-KJD-PAL

TRUSTEES OF THE OPERATING ENGINEERS
PENSION TRUST, et al.,

Plaintiffs,

vs.

ALLIE, LLC, a Nevada limited liability company,
d/b/a ALL CITIES CONCRETE COMPANY, et
al.,

Defendants.

**ORDER RE CROSS MOTIONS FOR
SUMMARY JUDGMENT**

The above entitled case came on regularly for hearing on Plaintiffs' motion for summary judgment against defendant JPM Construction, LLC (hereinafter "JPM") and JPM's cross motion for summary judgment against plaintiffs before the Honorable James C. Mahan, United States District Judge, presiding. Michael A. Urban, of Laquer, Urban, Clifford & Hodge, LLP, appeared as counsel for plaintiffs and moving parties, Trustees of the Operating Engineers Pension Trust, et al. Shawn L. Morris of Woodbury, Morris & Brown, appeared on behalf of the defendant and cross-moving party, JPM. Based upon the cross-motions, declarations and pleadings on file in this action, and there being no

1 material issue of fact in dispute, the Court grants the plaintiffs' motion for summary judgment and
2 denies the JPM motion for summary judgment and makes the following findings of fact and conclusions
3 of law:

4 **Finding of Fact**

5 1. The plaintiffs are the Trustees of the Operating Engineers Pension Trust, Trustees of the
6 Operating Engineers Health and Welfare Fund, Trustees of the Operating Engineers Vacation-Holiday
7 Savings Trust and Trustees of the Journeyman and Apprentice Training Trust (hereinafter "Trusts").

8 2. The Trusts are express trusts established pursuant to written declarations and agreements
9 of trust between the International Union of Operating Engineers, Local Union No. 12 (hereinafter "Local
10 12"), and various multi-employer associations in the construction industry in Southern California and
11 Southern Nevada.

12 3. Defendant Thornton Concrete Pumping, Inc. (hereinafter "Thornton") was a Nevada
13 corporation and an employer engaged in interstate commerce within the meaning of Section 301(a) of
14 the Labor Management Relations Act.

15 4. Local 12 is a labor organization representing employees in an industry affecting interstate
16 commerce.

17 5. Thornton was a signatory to a collective bargaining agreement (the "master labor
18 agreement") with Local 12. By the terms of the master labor agreement, Thornton was obligated to pay
19 fringe benefit contributions to the Trusts for every hour worked by or paid to any employee who
20 performed work covered by the master labor agreement.

21 6. Thornton failed to pay required fringe contributions, resulting in damages to the Trusts in
22 the amount of \$245,924.45 in unpaid contributions, liquidated damages in the amount of \$51,587.10,
23 and interest in the amount of \$40,857.50, for a total amount of damages to the Trusts in the amount of
24 \$338,369.05. This amount did not include all of the attorneys' fees and costs, and daily accruing post-
25 judgment interest due by Thornton.

26 7. In an effort to procure the payment of Thornton's delinquent fringe benefit contributions,
27 together with the liquidated damages and interest, the Trustees of the Trusts commenced two actions
28

1 against Thornton in United States District Court: Case Nos. 2:09-cv-1162-JCM-PAL (the “first
2 delinquency”) and the current case, 2:10-cv-502-JCM-PAL (the “second delinquency”).

3 8. The Trusts obtained default judgment against Thornton in the first delinquency matter on
4 February 2, 2010, in the amount of \$225,538.41 and proceeded to execute on such Judgment.

5 9. In executing on the Judgment in the first delinquency, the Trusts were able to receive a
6 total of \$46,491.04 in payments from Thornton through involuntary writs of garnishment on two of
7 Thornton’s bank accounts.

8 10. During post judgment discovery after obtaining judgment in the first delinquency action,
9 the Trusts conducted the judgment debtor examination of Richard Thornton on or about March 23, 2010.

10 11. Documents and invoices provided by Thornton at the judgment debtor examination
11 revealed that Thornton was a subcontractor for JPM and performed more than 207 hours of covered
12 work for JPM at various times from April of 2009, to March of 2010, on the following jobs:

- 13 a) April 6, 2009 – April 27, 2009: North Las Vegas Airport
- 14 b) May 20, 2009: North Las Vegas Justice Center
- 15 c) August 31, 2009: Justice Court (Pahrump)
- 16 d) May 28, 2009: Cambridge and Desert Inn Fire Station
- 17 e) June 2, 2009 – June 29, 2009: Fire Stations
- 18 f) July 22, 2009: El Bonita Shopping Center
- g) July 23, 2009: Sheriff’s Office (Pahrump)
- h) August 7, 2009 – August 18, 2009: Adams Elementary School
- i) October 16, 2009 – December 22, 2009: “Pahrump”
- j) November 9, 2009: “Reno & Spencer”
- k) February 15, 2010 – March 31, 2010: Palo Verde High School

19 12. For its work on each of these projects, Thornton was responsible to report and pay fringe
20 benefit contributions to the Trusts, pursuant to the master labor agreement due to its status as a signatory
21 to such master labor agreement. 29 U.S.C. § 1145. Thornton failed to pay the Trusts the required fringe
22 benefit contributions for the hours of covered work on the projects it worked on for JPM. The amounts
23 due to the Trusts by Thornton for the projects it worked on for JPM are apportionable as follows:

<u>Project</u>	<u>Dates</u>	<u>Hours</u>	<u>Rate</u>	<u>Contributions</u>	<u>Liquidated Damages</u>	<u>Interest due¹</u>	<u>Total amount due</u>
NLV Airport	4/6/09-4/27/09	20.25	\$16.67	\$337.57	\$33.76	\$24.94	\$396.27
N. LV Justice Center	5/20/2009	6	\$16.67	\$100.02	\$10.00	\$7.05	\$117.07
Pahrump Justice Center	8/31/2009	8	\$17.42	\$139.36	\$13.94	\$8.39	\$161.69
Cambridge & DI	5/28/2009	5	\$16.67	\$83.35	\$8.34	\$5.87	\$97.56
Fire Stations	6/2/2009	8.25	\$16.67	\$137.53	\$13.75	\$9.23	\$160.51

28 ¹ The amount of interest due is current as of March 17, 2011. Interest continues to accrue at a combined daily rate of \$0.42 *per diem*.

1	El Bonita	7/22/2009	8.5	\$17.42	\$148.07	\$14.81	\$9.43	\$172.31
	Sheriff's Office	7/23/2009	8.75	\$17.42	\$152.43	\$15.24	\$9.70	\$177.37
2	Adams Elementary	8/7/09-8/18/09	64	\$17.42	\$1,114.88	\$111.49	\$67.14	\$1,293.51
	Pahrump	10/16/09- 12/22/09	19	\$17.42	\$330.98	\$33.10	\$17.69	\$381.77
3	Reno & Spencer	11/9/2009	9	\$17.42	\$156.78	\$15.68	\$7.86	\$180.32
4	Palo Verde H.S.	2/15/10-3/31/10	51	\$17.42	\$888.42	\$88.84	\$33.35	\$1,010.61
			207.75		\$3,589.39	\$358.94	\$200.65	\$4,148.98

13. The information provided by Thornton at the debtor examination established potential claims by the Trusts against several contractors who used the services of Thornton pursuant to NRS 608.150.

14. Prior to commencing litigation against Thornton's contractors (including JPM) pursuant to NRS 608.150, counsel for the Trusts attempted to obtain JPM's voluntary payment of delinquent fringe benefit contributions attributable to Thornton's work for JPM. Accordingly, the Trusts' counsel sent no fewer than three (3) pre-litigation letters to JPM.

15. In these letters, the Trusts identified the basis and grounds for liability under NRS 608.150 and invited JPM to respond and discuss the payment of amounts due pursuant to that statute. JPM never responded to any of these letters.

16. In the final June 21, 2010, letter, JPM was informed that continued failure to respond would result in JPM being included in the instant litigation and that the Trusts would also seek attorneys' fees and costs.

17. The Trusts commenced their lawsuit against the contractors, including JPM, on July 23, 2010, by filing their complaint (#1) in United States District Court Case No. 2:10-cv-1242-KJD-PAL (the "contractor action"). The Trusts asserted claims against each of Thornton's contractors, including JPM, for statutory damages pursuant to NRS 608.150.

18. JPM did not immediately file an answer to the Trusts' complaint, but instead filed its motion to dismiss (contractor action dkt. #25) on August 25, 2010.

19. The Trusts opposed JPM's motion to dismiss on September 8, 2010 (contractor action dkt. #31). On December 17, 2010, this Court entered its order denying JPM's motion to dismiss (contractor action dkt. #53).

4. Documents and invoices provided by Thornton at a judgment debtor examination revealed that Thornton was a subcontractor for JPM and performed more than 207 hours of covered work for JPM at various times from April of 2009 to March of 2010, on the following jobs:

- a) April 6, 2009 – April 27, 2009: North Las Vegas Airport
- b) May 20, 2009: North Las Vegas Justice Center
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- j) November 9, 2009: "Reno & Spencer"
- k) February 15, 2010 – March 31, 2010: Palo Verde High School

5. For its work on each of these projects, Thornton was responsible to report and pay fringe benefit contributions to the Trusts, pursuant to the master labor agreement due to its status as a signatory to such master labor agreement. 29 U.S.C. § 1145. Thornton failed to pay the Trusts the required fringe benefit contributions for the hours of covered work on the projects it worked on for JPM. The amounts due to the Trusts by Thornton for the projects it worked on for JPM are apportionable as follows:

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6. NRS 608.150 provides, in part,

Every original contractor making or taking any contract in this State for the erection, construction, alteration or repair of any building or structure, or other work, shall assume and is liable for the indebtedness for labor incurred by any subcontractor or any contractors action under, by or for the original contractor in performing any labor, construction or other work included in the subject of the original contract, for labor, and for the requirements imposed by chapters 616A to 617, inclusive, of NRS.

1 NRS 608.150(a). This statute clearly provides that a contractor who hires a subcontractor that is
 2 obligated or delinquent in some respect as to certain "indebtedness" is liable for such indebtedness,
 3 *including delinquent fringe benefit payments. See Tobler and Oliver Const. Co. v. Board of Trustees of*
 4 *the Health and Ins. Fund for Carpenters Local Union No. 971, 84 Nev. 438, 442, 442 P.2d 904, 906*
 5 *(1968).*

6 7. The provisions of NRS 608.150 encompass the facts in this case. JPM directly
 7 subcontracted work to Thornton for which fringe benefit contributions were not paid to the Trusts. JPM
 8 has argued that it is not an "original contractor" under the terms of NRS 608.150 and therefore should
 9 have no liability for the amounts due by Thornton. The Court finds that the language of NRS 608.150 is
 10 clearly broad enough to encompass subcontractors like JPM who subcontract work to an employer who
 11 fails to pay fringe benefit contributions to the Trusts. To hold otherwise would make the provisions of
 12 NRS 608.150 meaningless and eliminate the legislature's intent to protect workers in passing NRS
 13 608.150. *See U.S. Design & Const. Corp. v. Int'l Bhd. of Elec. Workers, Local 357, 118 Nev. 458, 462,*
 14 *50 P.3d 170, 72 (2002). See also, Hartford Fire Ins. Co. v. Trustees of the Const. Indus. and Laborers*
 15 *Health and Welfare Trust, 125 Nev. Adv. Rep. 16, 208 P.3d 884 (2009)(holding, inter alia, that trustees*
 16 *of employee trust funds need not give any notice of claims before recovering from contractor). The*
 17 *Court has reviewed and considered the unpublished decision in Wood v. Valentine Surfacing, 320 F.*
 18 *App'x 542 (9th Cir. 2009), cited by counsel for JPM and finds it not to be controlling this case. See also,*
 19 *Artiaga v. Hutchins Drywall, Inc., 2007 U.S. Dist. LEXIS 55554 (D. Nev. 2007).*

20 8. As a result of the subcontracting of work by JPM to Thornton and Thornton's failure to
 21 pay the Trusts fringe benefit contributions for such work, JPM is liable to the Trusts, pursuant to NRS
 22 608.150:

<u>Project</u>	<u>Dates</u>	<u>Hours</u>	<u>Rate</u>	<u>Contributions</u>	<u>Liquidated Damages</u>	<u>Interest due²</u>	<u>Total amount due</u>
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		<u>207.75</u>		<u>\$3,589.39</u>	<u>\$358.94</u>	<u>\$200.65</u>	<u>\$4,148.98</u>

See U.S. Design Const. Corp. v. Int'l Bhd. of Elec. Workers, Local 357, supra, and Tobler and Oliver Const. Co. v. Board of Trustees of the Health and Ins. Fund for Carpenters Local Union No. 971, supra.

9. In addition to the amounts due by Thornton, JPM is obligated to pay the Trusts their attorney's fees of \$15,769.38 and costs of \$520.61. See NRS Section 18.010 and U.S. Design Const. Corp. v. Int'l Bhd. of Elec. Workers, Local 357, supra.

10. All of defendant's affirmative defenses are without merit.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED this 25th day of July, 2011.


UNITED STATES DISTRICT JUDGE

Submitted by:

LAQUER, URBAN, CLIFFORD & HODGE LLP

By:


MICHAEL A. URBAN, ESQ.
EMILY Z. MANNINGER, ESQ.
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on the 18 day of July, 2011, I served a copy of the foregoing **ORDER RE CROSS MOTION FOR SUMMARY JUDGMENT** through the CM/ECF electronic filing system of the United States District Court for the District of Nevada or, if necessary, via United States mail, first class postage prepaid, to:

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